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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 310

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

REPLY OF AL RICHMOND AND PHILIP MARSHALL CONNELLY TO BRIEF OF UNITED STATES IN OPPOSITION (Pursuant to Rule 24 (4)).

The Government's brief in opposition, although 72 pages in length, contains but scant reference to the specific arguments advanced on behalf of petitioners Rich-

mond and Connelly. Those scant references in no way meet the points which were presented on behalf of these petitioners. Some of petitioners' points were not even mentioned in the Government's brief. The relevant arguments which the brief does contain are simply a statement of the *conclusion* which the Government urges. In short, and in so far as petitioners Richmond and Connelly are concerned, the brief in opposition either begs the question or is irrelevant.

I.

PETITIONERS' ARGUMENTS HAVE NOT BEEN MENTIONED BY THE BRIEF IN OPPOSITION.

A. On pages 17 to 19 of the petition for writ of certiorari this argument was made: The Court of Appeals concluded that when a prosecution for conspiracy to violate the Smith Act is based on 18 U.S.C. Section 371, the limitations of free speech, press and assembly are inconsequential as compared with those present in the *Dennis* case, and therefore the First Amendment does not extend to defendants prosecuted under 18 U.S.C. Section 371 the same protections as were available when the indictment was under the now repealed conspiracy section of the Smith Act; this conclusion is erroneous and made it impossible for the Court below to properly consider petitioners' rights under the First Amendment; it is important that this Court consider whether a prosecution under 18 U.S.C. Section 371 is any different, for First Amendment purposes, than the indictment in *Dennis*, since future indictments will be under Section 371.

The above argument was considered in the Government's reply only as follows:

1. The Government does not contend that the change in the technical form of the indictment has effected any "drastic change". (Brief in Opposition, p. 59.)

2. No reply is made to the contentions of petitioners Richmond and Connelly outlined above.

B. The petition filed for Richmond and Connelly points out on pages 19 to 22 that their convictions raise a question "not presented—indeed reserved—in the *Dennis* case". (pp. 21-22.) That question is whether application of the Smith Act to *these petitioners* violates the First Amendment. The question is new because of the fact that *these petitioners*, unlike the *Dennis* defendants, were not shown to have been party officers, national, state or local; these petitioners, unlike those in *Dennis*, were not shown to have had any connection with the distribution or teaching of those documents which in the *Dennis* case formed the basis for a conclusion that the defendants conspired to advocate violent overthrow of the Government.

The Government seeks to avoid the question thus reserved, and new here, by consciously refusing to distinguish one petitioner from another, and thereby treating any evidence as to one as evidence against all. Thus, the Government brief speaks of "the dominant role of the petitioners in organizing and directing the Communist Party in California" (p. 5), and "petitioners are the principal organizers and leaders of the Communist Party in California". (p. 41.) But these generalizations only obscure the unchallengeable fact that the lengthy record

below contains absolutely no evidence whatever to bring petitioners Richmond and Connelly within such sweeping characterization. All that was shown as to these petitioners was that they participated in clearly lawful party activities, that they published a newspaper which, if "far left" in its views, certainly advocated nothing akin to violence, and further that they discussed this newspaper at Party meetings—"secret" meetings, the Government argues, as if secrecy were itself a crime. Clearly the convictions of petitioners here go far beyond the *Dennis* case and far beyond those later Smith Act cases in which this Court denied certiorari. (See Petition, page 20, note 12.)

To petitioners' contention that the constitutionality of this extension of the *Dennis* case should be considered by this Court, the Government's brief replies with silence.

II.

THE BRIEF IN OPPOSITION BEGS THE QUESTION.

The Government's brief contains two passages relevant to the petition for writ of certiorari filed for Richmond and Connelly. The first of these passages is found at pages 41 to 42, and reads as follows:

> "The First Amendment's guarantee of freedom of press did not preclude the conviction of petitioners Richmond and Connelly. As editors of *The People's World*, a publication established, supported and strictly controlled by the Communist Party in California, they were convicted of playing active and leading roles in the over-all conspiracy charged in the indictment."

The Government asserts that petitioners are not protected by the First Amendment. But of course this is the point in issue. The statement of a conclusion is hardly a weighty argument.

The second relevant passage occurs at pages 49 to 50 of the Government's brief:

> "Petitioners Richmond and Connelly have petitioned separately (Pet. No. 310) on the grounds of the insufficiency of the evidence as to them. Petitioners attempt to disguise their membership in the conspiracy by picturing their activity as the exercise of freedom of the press protected by the First Amendment. Under the charge of the trial judge, these petitioners were not convicted for editing a newspaper, but for membership in a conspiracy advocating the violent overthrow of the Government. The First Amendment does not protect the activities of newspaper editors if those activities are an adjunct to a conspiracy such as that here charged. *United States v. Lebron*, 222 F.2d 531, 536 (C.A.2), pending on petition for certiorari, No. 139 Misc. The evidence showed that it is a Marxist-Leninist tenet that a Party newspaper is necessary to a successful revolution (*supra*, pp. 19-21). That these two petitioners were busy implementing this Party principle constitutes no basis for exempting them from the prohibitions of the Smith Act.
>
> "The activities of petitioners Richmond and Connelly in the conspiracy were no different from those of the other petitioners. They had been active in the State and County committees of the Party which, as we have shown, was where control over the Party apparatus, including Party newspapers, schools and classes was exercised. Their positions as editors do not insulate them from the consequences of the

conspiracy any more than did the functioning in similar positions of the *Dennis* petitioners Davis and Gates."

This, of course, is simply an expansion of the earlier statement. Contrary to what the Government states, the issue raised by petitioners is not simply a matter of the "sufficiency of the evidence". The issue is whether the First Amendment is violated when, as here, the Courts below permit the publishing of a lawful newspaper, the participation in lawful trade-union activities, and the discussion of that newspaper and those union activities to be the basis for a conclusion that petitioners, intending to violently overthrow the Government as quickly as they could, joined a conspiracy to violate Section 2 of the Smith Act. The Government's position seems to be that if the end result of petitioners' activities is of some help to the Communist Party in any of its objects, then petitioners can be found guilty of the offenses here in question and no constitutional problem is involved. We think quite differently.

We think, as was stated in our petition, that the convictions here, realistically viewed, amount to a prohibition against participation in any of the lawful activities of the Communist Party. If petitioners' convictions do not violate the guarantees of free press, speech and assembly, then any party member who participates in any lawful Party function is subject to conviction. (To this argument the Government makes no reply.) No such result was contemplated by this Court when it affirmed the *Dennis* convictions. No such result is proper if the substance of the First Amendment is to be pre-

served. Certainly the question thus presented is of sufficient importance to warrant review by this Court.

CONCLUSION.

Your petitioners respectfully submit that for the reasons above stated a petition for writ of certiorari should be granted and the decision below reversed.

Dated, Oakland, California,
September 23, 1955.

Respectfully submitted,

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Attorney for Petitioners.